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91-1681

No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

EWING POLLOCK AND POLLOCK, POLLOCK AND THOMAS,
Petitioners,

vs.

JAMES E. HUGHES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 18, 1992

QUESTIONS PRESENTED

1. Did the Third Circuit fail to pay sufficient deference to the District Judge's Order setting aside the first jury's award of compensatory damages under the federal abuse of discretion standard of review?

2. In relation to the second jury's award of punitive damages, did the District Court abuse its discretion as a matter of law, and deny due process to cross-petitioners, in refusing to charge the second jury as required by Pennsylvania law that cross-petitioners' conduct must be found outrageous as a prerequisite to an award of punitive damages?

3. Did the District Court err in permitting the petitioners' expert witnesses to testify as to value where such testimony was without basis in fact or law?

PARTIES TO THE PROCEEDING

The cross-petitioners joining in this cross-petition are: Ewing Pollock and Pollock, Pollock and Thomas.[1]

Other parties are: Consol Pennsylvania Coal Company; Greenon Coal Company (formerly called Rheinbraun U.S. Corporation); The Monogahela Railway Company; Consolidation Coal Company; Consol Land Development Company; Maria Theresia Bergbuagesellschaft mbH; Rheinbraun A.G.[2]; William Resse; David Boggs; and the Upshur Agency, Inc.

The petitioners are: James E. Hughes; Linda L. Hughes; Dorothy Loughman: Paul H. Kent; Mabel Kent; James C. McIntyre; Glenna McIntyre; Larry Levine; Dan Levine; Morris Levine; Edward Levine; Morris Levine Enterprises, Inc.; Levine Iron & Metal, Inc.; John W. Yesenosky, Jr.; Linda M. Yesenosky; Thomas J. Allen and Estate of John T. Throckmorton; Mark E. Headlee; and Charlotte B. Headlee.

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[1] Pursuant to Rule 29.1, the Court is advised that this cross-petition is filed on behalf of an individual and a law firm and no corporation, parent or subsidiary is involved.

[2] These foregoing parties have previously filed a Petition for Writ of Certiorari at No. 91-1324.

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United States v. United States Gypsum Co., 333 U.S. 364 (1948)

CONSTITUTION, STATUTES AND RULES

U.S. Const. amend. V.

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68 (1988 & Supp. 1989)

28 U.S.C. §1254 (1) (1988)

28 U.S.C. §1291 (1988)

28 U.S.C. §1331 (1988)

Fed. R. Civ. P. 52

Fed. R. Civ. P. 59

Miscellaneous

Henry J. Friendly, Indescretion About Discretion, 31 Emory L.J. 747, 759 (1982)

6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice §59.08 [6] (2d ed. 1989)

IN THE

SUPREME COURT OF THE UNITE[illegible]TES

October Term, 1991

JAMES E. HUGHES, et

P[illegible]oners,

vs.

CONSOL PENNSYLVANIA COAL C[illegible] al.,

Cross [illegible]itioners.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The cross-petitioners respectfully pray that a writ of certiorari issue to review the amended judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on December 20, 1991. This cross-petition adopts and restates, in part, the petition for writ of certiorari filed by the Consol Petitioners at No. 91-1324.

OPINIONS BELOW

There have been three relevant opinions below:

1. Loughman v. Consol-Pennsylvania Coal Co., No. 83-921 (D.C.W.D. Pa., 1987) (Teitelbaum, D.J.) (ordering partial new trial) (unreported) (A-104a);[3]

2. Loughman v. Consol-Pennsylvania Coal Co., 740 F.Supp. 1114 (W.D. Pa. 1990) (Smith, D.J.) (denying post-trial motions after second trial) (A-70a); and

3. Hughes v. Consol-Pennsylvania Coal Co., No. 90-346 (3d Cir. Dec. 20, 1991) (Nygaard, C.J.) (vacating second damages award and reinstating first) (amended and restated opinion) (A-1A).[4]

JURISDICTION

These were eight consolidated actions for fraud and conspiracy under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO"), and at common law. The District Court had subject-matter jurisdiction under 28 U.S.C. §1331 and, on principles of pendent jurisdiction as to the state law claims.

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[3] References to pages of the appendix attached to petitioners' petition for writ of Certiorari are in the form "(A___)".

[4] The original opinion of the Third Circuit is reported at 945 F2.d 594. The opinion of December 20, 1991, amends and restates the original opinion in its entirety.

The Court of Appeals had jurisdiction to hear the appeal from the final judgment from the District Court under 28 U.S.C. §1291. The original opinion of the Court of Appeals issued September 20, 1991, and is reported at 945 F.2d 594. Timely petitions for rehearing with suggestions for rehearing en banc were filed by all parties. Cross-petitioners' petition was denied on October 23, 1991. Petitioners' petition was denied on December 20, 1991. The amended and restated opinion and judgment of the Court of Appeals were entered December 20, 1991. Petitioners filed their petition for certiorari on March 19, 1992. The petition was received by cross-petitioners' on March 21, 1992. The cross-petition for a writ of certiorari was filed within thirty days of that date. Sup. Ct. R. 12.3. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Preliminary Statement

These cases concern the misapplication by the Court of Appeals of the abuse of discretion standard to the review of a District Court's order of a partial new trial to redetermine both compensatory and punitive damages. The partial new trial was granted by a highly experienced District Court Judge because, on the "overwhelm-

ing evidence," (the damages awarded by the first jury were "obscenely excessive." (A-105a) On appeal from the judgment on the second jury's verdict, the Court of Appeals vacated the second jury's lesser award of compensatory and punitive damages and reinstated the "obscenely excessive" award of compensatory and punitive damages of the first jury.

Proceedings in the District Court

a. The Factual Background

In 1981, Consolidation Coal Company ("Consol"), a coal producer based in Pittsburgh, Pennsylvania, and Rheinbraun A.G., a coal producer of Cologne, Germany, and affiliates ("Rheinbraun"), formed a joint venture to develop coal reserves near Waynesburg, Pennsylvania. The mine was to be located near the junction of a railroad operated by The Monongahela Railway Company ("Monongahela"). Construction of the spur on a right-of-way running from the mine to the junction was necessary. As planned, the right-of-way would run over largely vacant, rural parcels of land. By 1982, all parcels necessary were purchased by Monongahela. Ewing Pollock, an attorney, and the law firm of Pollock, Pollock and Thomas in which he was a partner, represented Consol and Monongahela in the title work and closings involved in the acquisition.

In early 1983, petitioners filed eight separate actions in the United States District Court for the Western District of Pennsylvania (Pittsburgh) against Consol, Rheinbraun, The Monongahela, Ewing Pollock, Pollock, Pollock & Thomas, and others. The petitioners alleged.

fraud and conspiracy under the RICO statute, 18 U.S.C. §§1961-68 and at common law, perpetrated by the cross-petitioners' and others during the negotiations for purchase of the petitioners' real estate. The frauds alleged included false statements that only The Monongahela, and not Consol, was involved in the purchases, and that part of the purchase price would be tax-free to the sellers. Petitioners demanded compensatory and punitive damages.

b. The First Trial

The cases were consolidated and tried to a jury in early 1987. The Honorable Hubert I. Teitelbaum, an experienced federal trial judge, presided. During the first trial, the judge and jury viewed the real estate in question.

The first jury found the cross-petitioners and others liable under one or more claims, and awarded compensatory damages aggregating $5,360,500. The jury also awarded punitive damages in the amount of $35,000 against cross-petitioners.

On October 22, 1987, Judge Teitelbaum granted cross-petitioners' motion for judgment n.o.v. on the RICO claims and, in respect to the pendent state law claims, ordered a partial new trial on the damage issue (after petitioners refused remittitur), characterizing the jury's award as "obscenely excessive" (A-105a). He held that the "overwhelming evidence" indicated that the petitioners' properties which he and the jury had viewed were worth far less than the values found by the jury:

> For example, the jury awarded the Hughes' (Civil Action No. 876-1678) (sic) $122,000 in damages, even though they had purchased that same property some four years earlier for a mere $9,500. Dorothy Loughman (Civil Action No. 83-921) had sold ten acres of her property for only $800 per acre approximately six years prior to the sale of another portion of the same property to defendants. The jury, however, awarded her damages amounting to approximately $100,000 per acre for the portion of her property she sold to the defendants. The Yesenoskys had listed their property as being for sale in 1980 for $40,00. The jury awarded the Yesenoskys $435,000 in damages for the sale of their property to defendants less that two years later. (A-113a).

Judge Teitelbaum also held that petitioners' witness on real estate valuation, Mr. Bodnar, adopted an untenable theory of valuation. Bodnar's method was to value the petitioners' parcels on the basis of the prices paid to the last three of fifty sellers in a series of parcels, purchased by The Monongahela as it rushed to complete the mining project. The court held:

> [T]he jury obviously relied heavily on the testimony of Mr. Bodnar, who explained on cross-examination that his figures were based largely on the prices paid to three (out of some fifty) land owners who were the last to sell their properties for the railroad

> right-of-way: Grover Phillipi ($146,670 per acre); John Culp ($75,216per acre); and Sarah Closser ($240,108 per acre). All other sales, except for the three, were ignored by Mr. Bodnar in asserting the fair market value of plaintiffs' properties... It defies reason to infer that these three sales, all of them by "hold-outs", are indicative in any way of the fair market values of the properties of those who were among the earliest to sell. It is far more reasonable to infer that the prices paid to Phillipi,Culp, and Closser for their properties were far in excess of their true market values - because the defendants were operating under severe time constraints - that it is to infer the fair market values of plaintiffs' properties can be based on the prices paid to Phillipi, Culp, and Closser. (A-113-114a).

The trial judge's analysis was thus founded in reason and on inferences from the evidence that he was specially qualified to make. As Pennsylvania law precludes an award of punitive damages absent an award of compensatory damages, and as any award of punitive damages could not have born a "reasonable relationship" to an incompetent award of compensatory damages, the judge set a side the entire award.

Judge Teitelbaum's dismissal of petitioners' RICO claims was sustained by the Honorable

D. Brooks Smith and subsequently by the Third Circuit.[5]

c. The Second Trial

On March 6, 1990, a second jury trial commenced before the Honorable D. Brooks Smith. The same evidence relevant to damages, including the testimony of Mr. Bodnar, was heard by the second jury. The second jury also heard testimony of petitioners' second "valuation expert," J. Kenneth Willison.

On April 6, 1990, this second jury awarded compensatory damages of $4,262,677 and punitive damages against cross-petitioners of $23,500.

At the close of the second trial, cross-petitioners moved on April 20, 1990 for judgment n.o.v. and for a new trial. The motion was denied by Judge Smith.

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[5] Judge Teitelbaum initially held that the evidence did not prove ongoing misconduct. Petitions moved to reconsider in light of more recent Third Circuit authority and Judge Teitlebaum vacated the RICO dismissal. After this court decided H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), however, the District Court per Judge Smith reinstated the dismissal of the RICO claims. Loughman v. Pennsylvania Coal Co., 740 F. Supp. 1114 (W.D. Pa 1990), aff'd in relevant part sub. nom. Hughes v. Consol Pennsylvania Co., No. 90-3466 (3d Cir. Dec. 20, 1991).C.

Proceedings in the Third Circuit

Cross- petitioners, petitioners, and all other parties filed appeals with the Third Circuit. Cross-petitioners contended that the awards of compensatory and punitive damages by the second jury were unsupported by competent evidence and violated the Due Process Clause. Cross-petitioners also raise the admissiblility of the testimony of petitioners' experts.

The Court of Appeals (per Nygaard, C.J.) disgregarded the results of the second trial. Purporting to apply an "abuse of discretion: standard of review to Judge Teitelbaum's original order of October 22, 1987, granting a new trial on damages, the Third Circuit held that Judge Teitelbaum erred in setting aside the first jury's award in its entirety and reinstated the first award, including the award of puintive damges. Hughes v. Consol Pennsylvania Coal Co., No. 90-3466 (3d Cir. Dec. 20, 1991).

With respect to the first jury's award of compensatory damages, the panel rejected Judge Teitlelbaum's assessment of "overwhelming evidence", and his inferences therefrom relating the value of petitioners' real estate. Ignoring the trial judges's direct knowledge of the terrain an the evidence of the prices at which several of the parcels of real estate had been bought and sold shortly before the sales to the Monongahela, and solely on the bases of contrary inference form Bodnar's testimony, Judge Nygaard reinstated the first jury's award despite Judge Teitelbaum's castigating repudiation of it. The Third Circuit held:

> Though the district court correctly char- acterized Closser, Culp and Phillipi as "hold-outs", it neglected to consider that plaintiffs would have demanded more money had they known what Closser, Culp and Phillipi knew - that Counsel was involved and that Monongahela could not have condemned their property for fixed prices. . . The District Court abused its discretion by discounting Bodnar's testimony in setting aside the damage award. (A-60a-61a).

Judge Nygaard's assertion that the petitioners would have demanded more money had they known what the hold-outs knew was speculation unsupported by the record and contrary to finding some inferences of the trial judge based on the "overwhelming evidence." Under the abuse of discretion standard as applied to issues of fact, a court of appeals may not engage in such speculation.

REASONS FOR GRANTING THE WRIT
Summary of the Argument

These cases involve referring isssues of complelling importance to the administration of federal justice.

A court of appeals must ordinarily view Distrct Court's factually-grounded order of a new trial on damages under an extremely deferential "abuse of discretion" standard. In relation to punitive damages, that familiar standard is affected by the Due Process Clause and means that when a District Court orders a new trial on punitive damages after a fact-intensive

inquiry, the district judge must be sustained unless wrong beyond all question. Here the Third Circuit ignored that principle. Second, in relation to the first jury's award compensatory damages, the Third Ciruit misapplied th usual federal abuse of discretion standard to Judge Teitelbaum's order for a new trial, where that order was based on a fact-intensive inquiry and should have been paid the greatest deference.

Third, under established federal practice, the second jury's award was flawed. The trial judge refused to instruct the second jury that it must find cross-petitioners' conduct "outrageous" if punitive damages were to be awarded. That failure violated Pennsylvania law and that trial judge's duty to apply that law to the case.

Finally, the Third Circuit permitted the testimony of petitioners' expert witnesses to stand despite the fact that their testimony had no basis in fact or law.

I

THE THIRD CIRCUIT MISAPPLIED THE ABUSE OF DISCRETION STANDARD TO THE ORDER OF A NEW TRIAL ON COMPENSATORY DAMAGES.

With respect to the nullification of the first jury's award of compensatory damages, the standard of review in the court of appeals is the abuse of discretion standard. 6A J. Moore, J. Lucas & G. Grotheer, Moore's federal practice, ¶59.08[6] at 59-177 (2d 1989). In the Third Circuit, this standard is plainly in force and means, in respect to a district judge's disposition of post-trial motions attacking the sufficiency of the evidence, that "it will not be said, that a district judge has abused its discretion if there is 'any basis and reason for [its] conclusions as to weight and injustice of the verdict . . .' " Shanno v. McGee Industrial Enterprised, Inc., 856 F.2d 562, 567 (3d Cir. 1988).[6]

In relation to an order of a district judge founded on factual elements, the abuse discretion standard requires deference by the court

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[6] In the instant case, the Third Circuit flagrantly misdirected itself with respect to its own standard of review. The only case cited for the standard is Semper v. Santos, 845 F. 2d 1233 (3d Cir. 1988). That case was an appeal from and appellate division of the Virgin Islands District Court where the Third Circuit said that the "usual deference" paid to discretionary rulings of a district Court: is inapplicable when one appellate court reviews another." Id. at 1235.

of appeals to the judge's order. A trial judge's order of a new trial on damages predicated on the judge's analysis of the evidence is such an order, for it is a decision "of the Judge who way and heard the witness and has the feel of the case which no appellate printed transcript can inpart." Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212,216 (1947); See; Anderson V. Bessemer City, 470 U.S. 564,580 (1985) (acknowledging that the trial judge "is more closely in touch than the appeals court with the milieu out of which the controversy before him arises"); Henry J. Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 759 (1982) ("The trial court's direct contact with the witnesses places it in a superior position" to determine facts under the abuse of discretion standard).

In relation to an order of a district judge founded on factual elements, the abuse discretion standard requires deference by the court of appeals to the judge's order. A trial judge's order of a new trial on damages predicated on the judge's analysis of the evidence is such an order, for it is a decision "of the judge who saw and heard the witness and has the feel of the case which no appelate printed transcript can inpart." Cone v. West Virginia Pulp & Paper Co, 330 U.S. 212, 216, (1947); See; Anderson v. Bessemer City, 470 U.S. 564, 580 (1985) (acknowledging that the trial judge "is more closely in touch than the appeals with the milieu out of which the

controversy before him arises"); Henry J. Friendly, Indescrition About Discretion 31 Emory L. J. 747, 759 (1982) ("The trial court's direct contact with the witnesses places it in a superior position" to determine facts under the abuse of discretion standard).

This Court has now made it clear that "[w]hen an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable." Cooter & Gell v. Hartmarx Corp, 110 S. Ct. 2447, 2458 (1990). The clearly erroneous standard of Fed.R.Civ.P. 52, the Court recalled, "requires the appellate court to uphold any district court determination that falls within a broad range of permissable conclusions" Id.; accord Anderson, supra. at 574 ("[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous"). Further, under the clearly erroneous rule, the trial judge's inferences of fact are entitled to the same respect as factual determinations. Id. at 580; United States v. United State Gypson Co, 333 U.S. 364, 394 (1948). Deference to the trial judge is especially appropriate where he is in better position than the court of appeals to decide the issue and the issue is factually multifarious, i.e., unyielding to useful generalizations by the appellate court. Cooter & Gell, 110 S. Ct. at 2459-60; cf. Salve Regina College v. Russell, 111 S.Ct. 1217, 1222 (1991) (de novo review proper where district court not "better positioned" to decide an issue of state law, as opposed to mixed question of law, fact, and issue not multifarious).

Although the trial judge's order of a new trial on damages was made under Rule 59, not Rule 52, his order draws strength from Cooter & Gell. Rule 59 gives the judge broad discretion to make a fact-intensive inquiry into the evidence of damage to determine whether the award was excessive. The trial judge made such an inquiry, as his opinion shows. A highly experienced trial judge of the Western District of Pennsylvania, more in touch within "milieu" of the controversy then the Court of Appeals in Philidelphia, Anderson, 470 U.S. at 580, Judge Teitelbaum heard petitioners' testimony about cross-petitioners' conduct, saw petitioners' properties during the jury's view, heard their testimony as to the prices at which their properties had recently been purchased and sold, and heard the Bodnar theory of value which the trial judge plainly thought ridiculous. He made reasonable inferences on the evidence. Under the clearly erroneous rule, his conclusion based on the "overwhelming evidence" that the award was "obscenely excessive" should not have been disturbed by the Court of Appeals merely on the strength of the contrary inference from the Bodnar testimony.

II

AT THE SECOND TRIAL THE DISTRICT COURT ABUSED ITS DISCRETION AS A MATTER OF LAW, AND DENIED DUE PROCESS TO THE PETITONERS WHEN THE COURT REFUSED TO INSTRUCT THE JURY THAT IT MUST FIND CROSS-PETITIONERS' CONDUCT OUTRAGEOUS IN ORDER TO AWARD PUNITIVE DAMAGES.

The first jury's award was properly set aside by the trial judge. The second jury's award of punitive damages was also defective because Judge Smith failed to charge the second jury that punitive damages may not be awarded under Pennsylvania law absent outrageous conduct.

The court explained in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989) that as a matter of federal law, a district judge reviewing an award of punitive damages must ensure that the jury's verdict is "within the confines set by state law." That duty commands than judge to charge the jury respecting the standards for awarding punitive damages as required by state law. Id. This Court held in Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991) that, as a matter of due process, the trial judge must check the jury's award of punitive damages for excess. That requires that he "reflect in the record the reasons for interfering with the jury verdict, or refusing to do so, on grounds of excessiveness, of the [punitive] damages." American Employers Ins. Co. v. Southern Seeding Services, Inc, 931 F.2d 1453, 1457 (11th Cir. 1991) (applying Haslip and quoting relevant decisions of Supreme Court of Alabama).

Judge Smith ignored these principles. Pennsylvania law bars an award of punitive damages unless the jury finds the relevant conduct "outrageous". Rizzo v. Haines, 520 Pa. 484, 507, 55 A.2d 58, 69 (1989); Feld v. Merriam, 506 Pa. 383, 395, 485 A.2d 742, 748 (1984). But Judge Smith charged the jury on April 2, 1990,

that "you're instructed to consider only the conduct that has previously been determined as outrageous." This reflected his mistaken view that a "punitive damage claim is an entirely separate cause of action" and that cross-petitioners' liability on that "cause of action" had been determined by the prior jury. In effect, he mistakenly directed the jury to presume that the cross-petitioners' conduct had been outrageous. See Mason v. Texaco, Inc., 948 F. 2d 1546, 1554 (10th Cir. 1991) ("A punitive damage claim is not an independent cause of action or issue separate from the balance of plaintiff's case. It is part and parcel of a liability determination and does not have any independent being until a jury has decided...that defendant's conduct...was gross, willful, wanton or malicious....").

Liability for punitive damages in Pennsylvania has always depended, inter alia, on the "character" of the acts of the defendant; that requires a determination of outrageousness. Kirkbride v. Lisbon Contractors, Inc, 521 Pa. 97, 102, 55 A.2d 800, 803; See Molzof v. United States, 112 S.Ct. 711, 715-16 (1992) (Common law definition of punitive damages focuses on nature of defendant's conduct). As the first jury's award of punitive damages had been nullified, any determination it may have made about the outrageousness of cross-petitioners' conduct disappeared. It fell to the second jury to redetermine the issue. Its determination to award punitive damages required an evidentiary finding, not a presumption directed by the judge, of outrageous conduct.

After the second jury awarded $674,000 in punitive damages, Judge Smith denied cross-petitioners' motion for a new trial without comment. In refusing to rectify his erroneous charge, Judge Smith abused his discretion on a point of law, a decision reviewable de novo and that should have been reversed. Salve Regina College, 111 S.Ct. at 1222. By the same token, his refusal was a denial of the due process check required by Haslip in that he failed to express on the record the reasons for the denial. American Employers, supra., at 1456-58. Although cross-petitioners joined in the arguement of Consol, Rheinbraun and Monongahela, the ThirdCircuit ignored the matter simply holding that petitioers "clearly showed outrageous conduct."

III

THE DISTRICT COURT ERRED IN PERMITTING TESTIMONY OF PETITIONERS' EXPERT WITNESSES AS TO VALUE WHERE THE TESTIMONY WAS WITHOUT BASIS IN FACT OR APPROPRIATE METHODOLOGY AND FAILED AS A MATTER OF LAW TO ESTABLISH THAT PROPERTY OWNERS WERE PAID LESS THAN FAIR MARKET VALUE.

Prior to the testimony of Gary Bodnar at the first trial, cross-petitionerws and other defendanbts joined in a motion in limine to prohibit the testimony of Garty Bodnar, the petitioners' expert witness. Prior to the second trial on damages, these same parites joined in a similar motion to prohibit the testimony of Gary Bodnar and J. Kenneht Willison. The motions were addressed to the improper methodologies

used in the preparation of the expert opinions and to the conclusions made by the experts which were not supported by the facts.

Under the Federal Rules of Evidence, Rule 702, the role of the expert is not only to explain evidence but to be a source of evidence. The trial judge sits in the best position to determine if the explanation by the expert will assist the jury. However,the determination of whether the underlying evidence should have been allowed is significantly intertwined with the underlying substantive law so as to be reviewable by the appellate court with less deference to the trial judge. In re: Air Crash Disaster at New Orleans, Louisiana, 795 F. 2d 1230, 1233 (5th Cir. 1986). In the instant cases, Judge Smith permitted J. Kenneth Willison's testimony that the right-of-way portion of petitioners' property was worth from $76,000 to $300,000 per acre. These valuations were based on his "analysis" of various sales of commercial and industrial property in the Greene County area.

As Judge Smith succinctly stated in addressing the measurement of damages:

> The measure of damages is to fix the value of the property, and the fixing of the value of the property ought to be governed by virtually the same rules that the valuation of property and condemnation or any other proceeding.

The "rules" governing the valuation of property and condemnation are found in the Pennsylvania Eminent Domain Code ("Code") 26 P.S. §§1-601, et seq. The code requires that "just compensation" be paid for property taken

by condemnation. 26 P.S. §§1-601. Just compensation is defined as consisting of:

> [T]he difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in Code 26 P.S. §1-602(A).The Pennsylvania supreme court has recognized that the value is what the "property owner has lost, not what the condemnor has gained." Garella v. Redevelopment Authority of Allegheny County, 413 Pa. 181, 196 A.2d 344, 348 n.4(1964). This holding was entirely disregarded by the second trial court when it permitted Mr. Willison and Mr. Bodnar to testify as to the fair market value of the petitioners' properties. Mr. Willison, in his analysis considered the properties as commercial or industrial where such was not their use prior to the acquisition. The analysis performed on Mr. Willison clearly departed from the standard set forth in the Code and the law.

Similarly, Mr. Bodnar's testimony failed to meet the court announced and Code-required standard for damages. His valuations were calculated by using the prices paid to the hold-outs and no other independent sales were utilized. Bodnar's testimony was virtually

identical at both trials. In fact, Judge Smith found "the methodology of Mr. Bodnar to be incredible" but permitted the jury to receive the testimony nonetheless.

A review of the jury verdict and a comparison of the award of the jury with the valuation of the petitioners' experts shows clearly that the jurors relied to a great extent on the valuations (A-121a-161a). The Third Circuit has previously held that the Federal Rules establish a liberal policy of permitting expert testimony which will aid the trier of fact. Roe v. Deere & Co., 855 F.2d 151, 155 (3d Cir. 1988). However, it is apparent that the testimony of these experts so far departed from the appropriate means and methods of valuations as set forth in the Code as to be improper.The second Jury's verdict on damages was predicated on a misguided understanding of the applicable law and departed form the appropriate methods of valuation. See: DiRose v. PK Management, 691 F.2d 628, 631 (2.d Cir. 1982);Roe v. Deere & Co., supra.

CONCLUSION

The Court of Appeals failed to pay sufficient deference to Judge Teitelbaum's order setting aside the compensatory award of the first jury under the abuse of discretion standard.

At the second trial, Judge Smith abused his discretion as a matter of law and in denying cross-petitioners' motion for a new trial.

Finally, Judge Smith abused his discretion as a matter of law in permitting petitioners' expert witnesses to testify.

The writ should be granted to rectify these errors and to settle recurring problems of federal law.

Respectfully submitted,

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